127 (4) MAY 6

No. 08-824

In the Supreme Court of the United States

JAMES E. PIETRANGELO, II, PETITIONER

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
ANTHONY J. STEINMEYER
HENRY C. WHITAKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether 10 U.S.C. 654, which establishes the policy concerning homosexuality in the armed forces, is constitutional under the First and Fifth Amendments.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Able v. *United States*:
88 F.3d 1280 (2d Cir. 1996) 11
155 F.3d 628 (2d Cir. 1998) 9, 11
FCC v. *Fox Television Stations, Inc.*, No. 07-582 (Apr. 28, 2009) 10
Gilligan v. *Morgan*, 413 U.S. 1 (1973) 7
Goldman v. *Weinberger*, 475 U.S. 503 (1986) 7
Holmes v. *California Army Nat'l Guard*, 124 F.3d 1126 (9th Cir. 1997), cert. denied, 525 U.S. 1067 (1999) 9, 11
Lawrence v. *Texas*, 539 U.S. 558 (2003) 4, 8
Lofton v. *Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), cert. denied, 543 U.S. 1081 (2005) 8
Muth v. *Frank*, 412 F.3d 808 (7th Cir.), cert. denied, 546 U.S. 988 (2005) 8
NCAA v. *Smith*, 525 U.S. 459 (1999) 10
Renne v. *Geary*, 501 U.S. 312 (1991) 11
Richenberg v. *Perry*, 97 F.3d 256 (8th Cir. 1996), cert. denied, 522 U.S. 807 (1997) 10, 11

Cases—Continued: Page

Romer v. *Evans*, 517 U.S. 620 (1996) 6
Rostker v. *Goldberg*, 453 U.S. 57 (1981) 7, 8
Rumsfeld v. *Forum for Academic & Institutional Rights*, 547 U.S. 47 (2006) 7
Seegmiller v. *LaVerkin City*, 528 F.3d 762 (10th Cir. 2008) 8
Sylvester v. *Fogley*, 465 F.3d 851 (8th Cir. 2006) 8
Thomasson v. *Perry*, 80 F.3d 915 (4th Cir.), cert. denied, 519 U.S. 948 (1996) 10, 11
Thorne v. *DoD*, 945 F. Supp. 924 (E.D. Va. 1996), aff'd, 129 F.3d 893 (4th Cir.), cert. denied, 525 U.S. 947 (1998) 11
United States v. *Bestfoods*, 524 U.S. 51 (1998) 10
United States v. *Williams*, 128 S. Ct. 1830 (2008) 12
Wayte v. *United States*, 470 U.S. 598 (1985) 11
Winter v. *NRDC, Inc.*, 129 S. Ct. 365 (2008) 7
Wisconsin v. *Mitchell*, 508 U.S. 476 (1993) 4, 11
Witt v. *Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008) 9

Constitution, statutes and rule:

U.S. Const.:
Amend. I 3, 6, 11
Amend. V (Due Process Clause) 3, 7, 10
10 U.S.C. 654 ..... *passim*
10 U.S.C. 654(a)(13) 2
10 U.S.C. 654(a)(15) 2
10 U.S.C. 654(b)(1)-(3) 2
10 U.S.C. 654(b)(2) 12

Statute and rule—Continued: Page

10 U.S.C. 654(f)(3)(A)-(B) 2
Fed. R. Civ. P. 12(b)(6) 3

In the Supreme Court of the United States

No. 08-824

JAMES E. PIETRANGELO, II, PETITIONER

v.

ROBERT M. GATES, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A68) is reported at 528 F.3d 42. The opinion of the district court (Pet. App. A69-A121) is reported at 429 F. Supp. 2d 385.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2008. A petition for rehearing was denied on August 8, 2008 (Pet. App. A122-A123). On October 22, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including January 5, 2009. The petition was filed on December 23, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 654 of Title 10 of the United States Code provides for separation from military service if a member of the armed forces has (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act"; (2) "stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts"; or (3) "married or attempted to marry a person known to be of the same biological sex." 10 U.S.C. 654(b)(1)-(3).[1]

In enacting 10 U.S.C. 654, Congress made a legislative finding that the longstanding "prohibition against homosexual conduct * * * continues to be necessary in the unique circumstances of military service." 10 U.S.C. 654(a)(13). Congress also determined that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. 654(a)(15).

2. Petitioner and 11 other former service members brought the present action, alleging that they had been separated from military service pursuant to Section

---

[1] Section 654 defines a "homosexual act" as "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)." 10 U.S.C. 654(f)(3)(A)-(B).

654.[2] They contended that their discharges violated their free speech, substantive due process, and equal protection rights under the First and Fifth Amendments. They sought declaratory and injunctive relief preventing further enforcement of Section 654, as well as an order requiring their readmission to their respective former service branches. In response, the government moved to dismiss the complaint for failure to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6).

3. The district court granted the government's motion to dismiss. Pet. App. A69-A121. As a threshold matter, the court held that the plaintiffs had stated only a facial challenge to the statute. According to the court, "none of the plaintiffs claims that the policy, if valid in general, was misapplied in his or her particular case." *Id.* at A77. "Rather, their objections," the district court recognized, "are *that* the policy was applied, not *how* it was applied. This is classically a facial challenge to the statute." *Id.* at A77-A78. The district court proceeded to uphold the statute against facial attack.

With respect to the plaintiffs' substantive due process and equal protection claims, the district court held that Section 654 is rationally related to a legitimate government interest. Pet. App. A99. Applying the deference traditionally afforded to legislative judgments about military policy, *id.* at A94-A96, the court determined that as a result of "extended consideration in both

---

[2] The other 11 former service members—Thomas Cook, Megan Dresch, Laura Galaburda, Jack Glover, David Hall, Monica Hill, Jenny Kopfstein, Jennifer McGinn, Justin Peacock, Derek Sparks, and Stacy Vasquez—have not petitioned for a writ of certiorari and are respondents before this Court. They are referred to herein as the Cook respondents.

the Executive and Legislative Branches," *id.* at A96, Congress was persuaded "that separation of open homosexuals from military service would help to maintain high effectiveness in the armed forces," *id.* at A99. Because "[t]hat proposition had support in the record developed in the legislative process," Section 654 is "rational in the sense necessary to withstand constitutional challenge." *Ibid.*

With respect to the plaintiffs' free speech claim, the court held that Section 654 "creates a presumption that a person who states that he or she is a homosexual (or bisexual) may * * * be considered to have an intention or propensity to engage in homosexual conduct." Pet. App. A116. According to the court, "[t]he evidentiary use of statements by a person to prove that person's intent is common in the adjudication of cases and is not prohibited by the First Amendment." *Ibid.* (citing *Wisconsin* v. *Mitchell*, 508 U.S. 476 (1993)). The court thus concluded that insofar as Section 654 burdens the plaintiffs' right to free speech, it does so "on a content-neutral, nonspeech basis" in order to serve "the important governmental interest of maintaining an effective national military." *Id.* at A118-A119. For that reason, the court recognized, several courts of appeals had rejected similar First Amendment claims. *Id.* at A119-A120.

4. The court of appeals, after consolidating separate appeals by petitioner and the Cook respondents, affirmed. Pet. App. A1-A68. The court held that "[t]he plaintiffs' facial challenge fails," because this Court's decision in *Lawrence* v. *Texas*, 539 U.S. 558 (2003), "did not identify a protected liberty interest in all forms and manner of sexual intimacy." Pet. App. A28. According to the court, "*Lawrence* recognized only a narrowly defined liberty interest in adult consensual sexual intimacy

in the confines of one's home and one's own private life." *Id.* at A28-A29. The court concluded that Section 654 "provides for the separation of a service person who engages in a public homosexual act or who coerces another person to engage in a homosexual act," which are both "forms of conduct [that] are expressly excluded from the liberty interest recognized by *Lawrence*." *Id.* at A29.

Unlike the district court, however, the court of appeals found that the plaintiffs had adequately pleaded an as-applied challenge. Pet. App. A29 n.8. The court reasoned that "the Act could apply to some conduct that falls within the zone of protected liberty identified by *Lawrence*," such as, for example, "homosexual conduct occurring off base between two consenting adults in the privacy of their home." *Id.* at A29. The court held that after *Lawrence* the appropriate standard of review for such a challenge "lies between strict scrutiny and rational basis." *Id.* at A27. But the court went on to reject plaintiffs' as-applied challenge based on the deference traditionally afforded to congressional judgment in the area of military affairs. *Id.* at A30-A33. The court surveyed the "detailed legislative record," which "makes plain that Congress concluded, after considered deliberation, that the Act was necessary to preserve the military's effectiveness as a fighting force, 10 U.S.C. § 654(a)(15), and thus, to ensure national security." *Id.* at A36. "Every as-applied challenge brought by a member of the armed forces against the Act, at its core, implicates this interest," the court continued, because "[e]very member of the armed forces has one fact in common—at a moment's notice he or she may be deployed to a combat area." *Id.* at A37. Accordingly, "judicial intrusion is simply not warranted." *Ibid.*

The court of appeals also rejected the plaintiffs' equal protection challenge. The court held that Section 654 does not target a suspect class and is rationally related to a legitimate government interest. Pet. App. A38-A40. According to the court, neither *Romer* v. *Evans*, 517 U.S. 620 (1996), nor *Lawrence* "mandate[s] heightened scrutiny of the Act because of its classification of homosexuals." Pet. App. A40. The court recognized that several other courts of appeals had reached the same conclusion. *Id.* at A39-A40. Applying rational basis review, the court concluded that "Congress has put forward a non-animus based explanation," and "substantial deference [is] owed Congress' assessment of the need for the legislation." *Id.* at A40.

Finally, the court of appeals rejected the plaintiffs' free speech challenge. The court held that "to the extent that the Act may be constitutionally applied to circumscribe sexual conduct, the First Amendment does not bar the military from using a member's declaration of homosexuality as evidence of a violation of the Act." Pet. App. A43-A44. The court of appeals "therefore join[ed] the other courts that have rejected First Amendment challenges to the Act on this basis." *Id.* at A44. Judge Saris, sitting by designation, dissented in part because she would have allowed petitioner to proceed with his First Amendment claim. *Id.* at A49-A68.

5. Petitioner, proceeding pro se, filed a petition for a writ of certiorari. The Cook respondents opposed a writ of certiorari, though they agreed with petitioner that the court of appeals had erred. See Cook Br. in Opp. 2 (Jan. 26, 2009). Petitioner subsequently moved to strike the brief in opposition filed by the Cook respondents. The Cook respondents withdrew the brief but indicated that they likely would refile a similar brief in

the future. See Cook Opp. to Pet. Mot. to Strike 5-6. The Cook respondents have now refiled their brief, opposing a writ of certiorari but agreeing with petitioner on the merits. See Cook Br. in Opp. 2-3 (May 6, 2009).

ARGUMENT

Petitioner contends (Pet. i, 5-6) that this Court should grant a writ of certiorari to determine whether 10 U.S.C. 654 violates his substantive due process, equal protection, and free speech rights. The decision of the court of appeals is correct and does not conflict with any decision of this Court. Moreover, petitioner did not properly preserve several of his contentions, making this case an unsuitable vehicle for addressing them. Further review is therefore not warranted.

1. Petitioner contends (Pet. 6-7, 24-27) that Section 654 violates the substantive component of the Fifth Amendment's Due Process Clause. As the court of appeals recognized, however, "'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies." *Rumsfeld* v. *Forum for Academic & Institutional Rights*, 547 U.S. 47, 58 (2006) (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981)); *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986). Moreover, because "complex, subtle, and professional decisions as to the composition * * * of a military force" are "essentially professional military judgments," courts "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Winter* v. *NRDC*, 129 S. Ct. 365, 377 (2008) (quoting *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973)).

Applying the strong deference traditionally afforded to the Legislative and Executive Branches in the area of

military affairs, the court of appeals properly upheld the statute. As the court explained, the "detailed legislative record" that Congress assembled in enacting Section 654 "makes plain that Congress concluded, after considered deliberation, that the Act was necessary to preserve the military's effectiveness as a fighting force, 10 U.S.C. § 654(a)(15), and thus, to ensure national security." Pet. App. A36. The court was properly "careful not to substitute [its] judgment of what is desirable for that of Congress, or [its] own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Rostker*, 453 U.S. at 68.

Petitioner argues (Pet. 24-26) that certiorari is warranted to address the applicable standard of review following this Court's decision in *Lawrence* v. *Texas*, 539 U.S. 558 (2003). In *Lawrence*, this Court sustained a substantive due process challenge to a state criminal statute that prohibited homosexual conduct among consenting civilian adults. *Id.* at 578. Although *Lawrence* did not involve a challenge to a federal civil statute involving military service members, the court of appeals in this case read *Lawrence* as indicating that a form of heightened scrutiny should govern Section 654 as and when applied to private, consensual sexual intimacy. Pet. App. A27.[3] But the court went on to recognize the deference owed to congressional judgments about mili-

---

[3] In contexts not involving the military, other courts of appeals in considering substantive due process challenges to civil statutes have not read *Lawrence* so broadly and have applied rational-basis review. See *Seegmiller* v. *LaVerkin City*, 528 F.3d 762, 771 (10th Cir. 2008); *Lofton* v. *Secretary of the Dep't of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004), cert. denied, 543 U.S. 1081 (2005); cf. *Sylvester* v. *Fogley*, 465 F.3d 851, 857-858 (8th Cir. 2006); *Muth* v. *Frank*, 412 F.3d 808, 818 (7th Cir.), cert. denied, 546 U.S. 988 (2005).

tary affairs and the weighty interests Congress identified as underlying Section 654, and the court dismissed the petitioner's claim on that basis. *Id.* at A30-A37. The court's decision upholding Section 654 thus rested not on its choice of a formal standard of review, but on its strong deference to Congress's judgments on matters relating to the armed forces.

Petitioner also points out (Pet. 25) that the Ninth Circuit has recently considered a service member's substantive due process challenge to Section 654. See *Witt* v. *Department of the Air Force*, 527 F.3d 806, 813-821 (9th Cir. 2008). But the decision in *Witt* provides no basis for reviewing the court of appeals' decision in this case and indeed may counsel to the contrary. The Ninth Circuit in *Witt*, also applying a form of heightened scrutiny, remanded for factual development of the plaintiffs' as-applied challenge to Section 654. *Id.* at 821. What will happen in *Witt* on remand is, of course, uncertain. If the Ninth Circuit, after further factual development, holds Section 654 constitutional as applied, the practical difference between that court's approach and the First Circuit's analysis may prove relatively slight. And if the Ninth Circuit ultimately holds Section 654 unconstitutional as applied, that case is likely to present a better vehicle for the Court to consider the challenges to the statute, in part because of a more developed factual record. The pendency of *Witt* thus militates in favor of allowing the First Circuit's decision to stand.

2. Petitioner further contends (Pet. 11-12) that Section 654 violates the equal protection component of the Fifth Amendment's Due Process Clause. The courts of appeals have uniformly rejected that contention. See *Witt*, 527 F.3d at 821; *Able* v. *United States*, 155 F.3d 628, 634-636 (2d Cir. 1998); *Holmes* v. *California*

Army Nat'l Guard, 124 F.3d 1126, 1132-1140 (9th Cir. 1997), cert. denied, 525 U.S. 1067 (1999); *Thomasson* v. *Perry*, 80 F.3d 915, 927-930 (4th Cir.) (en banc), cert. denied, 519 U.S. 948 (1996); *Richenberg* v. *Perry*, 97 F.3d 256, 260-262 (8th Cir. 1996), cert. denied, 522 U.S. 807 (1997). Those courts, like the court of appeals in this case, have concluded that Section 654's classification on the basis of homosexual conduct (and the propensity to engage in such conduct) is rationally related to the government's legitimate interest in military discipline and cohesion.

Petitioner argues that the court of appeals ignored his "as-applied equal protection claim that homosexuals are systematically abused in the military." Pet. 19 (emphasis omitted); see Pet. 19-21. Petitioner first raised that claim in a motion to alter or amend the district court's judgment, see Pet. App. A127-A133, and thus the district court correctly declined to address it, see *id.* at A125-A126. The district court's factbound conclusion that petitioner failed to properly preserve his claim does not warrant this Court's review, nor should this Court address the merits of that claim in the first instance. *FCC* v. *Fox Television Stations, Inc.*, No. 07-582 (Apr. 28, 2009), slip op. 25 ("This Court * * * is one of final review, not of first view.") (internal quotation marks omitted); see *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999); *United States* v. *Bestfoods*, 524 U.S. 51, 72-73 (1998).

And even assuming petitioner had preserved his equal protection claim, this Court would be in no position to review it. Petitioner's claim does not primarily concern Section 654's classification on the basis of homosexual conduct, but instead relates to the manner in which Section 654 is implemented by military officials. To the extent that petitioner states a claim at all,

such a claim should only be addressed on an appropriate factual record. Cf. *Renne* v. *Geary*, 501 U.S. 312, 324 (1991). No such record exists in this case.

3. Petitioner also contends (Pet. 12-17) that Section 654 violates the First Amendment. As the lower courts held, however, Section 654 merely creates a rebuttable presumption that an individual who identifies himself as a homosexual intends or has a propensity to engage in homosexual conduct (for which conduct the service member may be discharged).[4] This Court has recognized that "[t]he First Amendment * * * does not prohibit the evidentiary use of speech * * * to prove motive or intent." *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993); *Wayte* v. *United States*, 470 U.S. 598, 611 (1985).

For that reason, the courts of appeals have uniformly concluded that Section 654 does not violate the First Amendment. See *Able*, 155 F.3d at 636 (citing *Able* v. *United States*, 88 F.3d 1280, 1296 (2d Cir. 1996)); *Holmes*, 124 F.3d at 1136; *Thomasson*, 80 F.3d at 931-934; *Richenberg*, 97 F.3d at 262-263. This Court has repeatedly denied review in those cases, and there is no reason for a different outcome here.

Petitioner asserts that the court of appeals erred by failing to address his "chill/overbreadth claim." Pet. 17. As with his equal protection claim, petitioner first raised his overbreadth claim in a motion to alter or amend the district court's judgment, see Pet. App. A134-A137, and thus both the district court and the court of appeals correctly declined to address it, see *id.* at A41-A42 n.13, A125. Again, the lower courts' factbound conclusion that petitioner failed to properly preserve his overbreadth

[4] That presumption has been successfully rebutted in the past. See, *e.g.*, *Thorne* v. *DoD*, 945 F. Supp. 924, 927-929 (E.D. Va. 1996), aff'd, 129 F.3d 893 (4th Cir.), cert. denied, 525 U.S. 947 (1998).

claim does not warrant this Court's review, nor should this Court address the merits of that claim in the first instance.

Even were this Court to reach the merits, Section 654 concerns only statements by a service member "that he or she is a homosexual or bisexual, or words to that effect." 10 U.S.C. 654(b)(2). To prevail on his overbreadth claim, petitioner must demonstrate that Section 654 deters a substantial range of other protected speech. See *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008) ("[W]e have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."). Petitioner does not provide (Pet. 14-16) any evidence that Section 654 deters that broader range of protected speech, and thus his overbreadth claim is without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
ANTHONY J. STEINMEYER
HENRY C. WHITAKER
Attorneys

MAY 2009